U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

Date: May 31, 1989

Case No. 88-INA-65

In the Matter of

ADMIRAL GALLERY RESTAURANT,
Employer

on behalf of

LUIS O. CABRERA,
Alien

Lance K. Gellman, Esq.
For the Employer

Before: Litt, Chief Judge; Vittone, Deputy Chief Judge; Guill, Associate Chief Judge; and Brenner, Tureck, Williams, Administrative Law Judges

PER CURIAM

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (hereinafter "the Act"). The Employer requested review from U.S. Department of Labor Certifying Officer Bette F. Roy's denial of a labor certification application pursuant to 20 C.F.R. Section 656.26.[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for purposes of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

---

[1] All regulations cited in this decision are contained in Title 20 Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of the labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and written arguments of the parties [see Section 656.27(c)].

Statement of the Case

On November 7, 1985, the Employer filed an application for alien certification (AF 1-21) to enable the Alien to fill the position of Italian Specialty Cook in which position the Alien had been working since May 1984 (AF 2). Employer which is located in New York, New York is engaged in the restaurant business. One year of experience in the job was required.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer ("CO") on August 11, 1987 (AF 38-41), and the receipt of the Employer's rebuttal on September 15, 1987, (AF 42-44), the Final Determination denying certification was issued on September 23, 1987 (AF 45-46).

Discussion

The evidence of record reveals that the Alien's only work experience before beginning work for the Employer was that of a sales clerk in a Furniture Store (AF 2). The CO in her NOF (AF 38-41) pointed this out and instructed the Employer to document why it is not feasible for him to train a U.S. worker as the Alien was trained. The Employer was given the opportunity to eliminate the one year experience requirement, amend the application and to readvertise without the requirement for the listed experience.

In its rebuttal, the Employer acknowledged that its Chef had trained the Alien. It had two Italian Speciality Cooks, including the Alien, when he was hired and it had two Italian Speciality Cooks in September 1987 (AF 43). Employer claimed, however, that his business would be undermined if it were now required to train an inexperienced worker because it would take the Chef away from running the restaurant to train an inexperienced worker. The Employer also alleged that the Alien was hired just after the restaurant had opened and now it was operating at a break even point. While the business had expanded, the Employer maintained that it could not afford to hire additional help. The Employer submitted no additional evidence to the CO but attached copies of income tax returns for the years 1985 and 1986 to its appeal to this Board. We are precluded by subsection 656.27(c) from considering the tax returns as they were not submitted to the CO for her consideration.

In sum, the Employer admits that it hired the Alien in 1984 without experience, and then trained him on the job. It contends that it is not feasible to train an inexperienced cook now, because its business has grown and training a new person "could only create problems such as a slower kitchen and food quality which is not up to our expectations" (AF 26). As we stated in In the Matter of Bank of New York, 87-INA-664 (January 25, 1988), proof of infeasibility for purposes of section 656.21(b)(6) requires more than a showing of loss of efficiency. See also In the Matter of G.C. Construction Corp., 88-INA-20 (May 9, 1988). An apparent purpose of the regulation is to assure that, with the few exceptions not applicable to this case, U.S. workers who are qualified for a job need not compete with aliens with superior qualifications or abilities. To allow an employer to first train an alien for the job and then reject an untrained U.S. worker, on the ground that replacing the alien with the U.S. worker would result in a reduction of efficiency or productivity, would be to allow the circumvention of section 656.21(b)(6) in an egregious manner.

ORDER

The Certifying Officer's determination denying labor certification is AFFIRMED.

At Washington, D.C.

jsp